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No. 08-539

IN THE
# Supreme Court of the United States

REPUBLIC OF IRAQ, *et al.*,

*Petitioners*,

*v.*

ROBERT SIMON, *et al.*,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

## BRIEF OF DR. LOUIS FISHER AND DR. ROBERT J. SPITZER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether The Original National Defense Authorization Bill for Fiscal Year 2008 Became a Law On December 30, 2007, Because The President Did Not Veto The Act.

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## INTEREST OF AMICI CURIAE[1]

Dr. Louis Fisher is a Constitutional Specialist with the Law Library of Congress. Dr. Robert J. Spitzer is the Department Chair and Distinguished Service Professor, of the Political Science Department at the State University of New York, Cortland. *Amici* have produced substantial scholarly research on the Presidential veto power, and submit this brief to offer the Court whatever assistance they can on the subject of pocket vetoes, and on the so-called "hybrid veto." The views expressed here are personal, not institutional. *Amici* have no other stake in the outcome of this case.

## INTRODUCTION

On December 14, 2007, Congress passed H.R. 1585 (110th Cong. (2007)), titled the National Defense Authorization Act for Fiscal Year 2008 (the "original NDAA") by a vote of 370-49 in the House and 90-3 in the Senate. In §1083 of the original NDAA, Congress made it easier to sue foreign terrorist states under §1605 of the Foreign Sovereign Immunities Act ("FSIA") by giving plaintiffs additional procedural rights, and it enacted a new statute of limitations with respect to suits filed under §1605.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and such consents are being lodged herewith.

On December 19, 2007, the original NDAA was presented to the President. The first session of the House of Representatives of the 110th Congress was then adjourned, *sine die*[2], in accordance with a concurrent resolution with the Senate which contained a provision for reassembly of the House at the call of the Speaker.[3] The Clerk of the House was designated to receive messages during the adjournment, and remained in communication with the Speaker regarding House business, including action on bills.[4] The Senate remained in *pro forma* session through December 31, 2007, and then adjourned, *sine die*, until January 3, 2008.[5]

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[2] Congress adjourns *sine die*, without a day, at the end of each annual session, including the end of Congress. Section 2 of the Twentieth Amendment to the Constitution provides that Congress shall convene on January 3 of each year unless Congress by statute establishes a different date. U.S. Const. art. I, sec. 5.

[3] *Proceedings of the House of Representatives*, 153 Cong. Rec. H16901, H16940 (daily ed. Dec. 19, 2007). The resolution provided that:

> [t]he Majority Leader of the Senate and the Speaker of the House, or their respective designees, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify Members of the Senate and the House, respectively, to reassemble at such a place and time as they may designate if, in their opinion, the public interest shall warrant it.

S. Con. Res. 61, Sec. 3, 110th Cong. (2007) (enacted).

[4] *Proceedings of the House of Representatives After Sine Die Adjournment of the 110th Congress First Session*, 153 Cong. Rec. 199 (daily ed. Dec. 28, 2007).

[5] *Proceedings of the Senate*, 153 Cong. Rec. 200 (daily ed. Dec. 31, 2007).

On December 28, 2007, the President issued a Memorandum of Disapproval which stated, in pertinent part:

> The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929).[6]

The President claimed, however, that "[i]n addition to withholding [his] signature and thereby invoking [his] constitutional power to 'pocket veto' bills during an adjournment of the Congress," he was delivering the Memorandum of Disapproval and the bill to the Clerk of the House "to avoid unnecessary litigation about the non-enactment of the bill. . . ."

The Second Session of the 110th Congress reconvened on January 3, 2008. The Congress immediately objected to the President's assertion of a pocket veto, and on January 15, 2008, ordered that the Memorandum of Disapproval be re-characterized as a "veto message."[7] Considerable discussion ensued in

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[6] J.A. AL. The Memorandum of Disapproval begins with the words, "*I am withholding my approval* of H.R. 1585. . ." (emphasis added). This differs from the language traditionally used by the President in a regular veto message, which begins with the words, "*I am returning herewith without my approval* H.R. [ ] . . ." *See* 154 Cong. Rec. 40, H1419 (March 10, 2008) (emphasis added).

[7] 154 Cong. Rec. H5 (daily ed. Jan. 15, 2008); 154 Cong. Rec. S54, S56–7 (daily ed. Jan. 22, 2008).

both Houses of Congress regarding the manner in which the President had attempted to exercise his veto prerogative, and the resultant effect on the status of the bill. For example, Senator Harry Reid, in commenting on the "unfortunate and troubling path" of the legislation, admonished the President for not being "satisfied simply to veto the bill and risk an override," stating:

> The Constitution does not provide for double vetoes: A bill is vetoed either by being returned or, if return is prevented by Congress' adjournment, by being pocketed. . . . The President should abandon the strange and unseemly practice of maintaining that he cannot return a bill to Congress, while simultaneously returning the bill.[8]

In a letter to the President, a bi-partisan Congressional committee stated that:

> The circumstances surrounding the presentment and return of H.R. 1585 and the readiness of Congress to reconsider the bill in light of Presidential objections compel us to question the assertion that a pocket veto did or could have occurred. We think you

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[8] 154 Cong. Rec. S54, S56-7, (daily ed. Jan. 22, 2008) (statement of Sen. Harry Reid); *see also* 154 Cong. Rec. H75, H259 (daily ed. Jan. 16, 2008) (remarks of Rep. Skelton) ("There seems to be a rather interesting intellectual discussion as to the type of veto . . . To me it sounded as if there were two vetoes wrapped up in one message.").

> agree that the pocket veto and the return veto are available on mutually exclusive bases and, therefore, during mutually exclusive periods.[9]

Although some consideration may have been given to attempting an override of the President's "veto" of the original NDAA so as "to establish definitively the Congress' constitutional power to override a veto exercised during its adjournment," ultimately both Houses chose to avoid a constitutional confrontation and the matter was referred to legislative committee.[10] On January 16, 2008, the House passed H.R. 4986 (Pub. L. No. 110-181, 122 Stat. 3 (2008)), a revised version of the original National Defense Authorization Act, which the President then signed on January 28.

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[9] 154 Cong. Rec. E2197-E2198 (daily ed. Oct. 2, 2008).

[10] Senator Reid explained that:

> [M]uch as part of me would like to see Congress take the opportunity provided by the President's action here to establish definitively the Congress's constitutional power to override a veto exercised during its adjournment, the Nation's security and the care of our troops and wounded warriors demands that we get this bill signed into law as soon as possible. . . .

154 Cong. Rec. S57 (daily ed. Jan. 22, 2008) (statement of Sen. Reid); 154 Cong Rec. H10 (daily ed. Jan. 15, 2008).

## SUMMARY OF ARGUMENT

1. Under the Presentment Clause, a pocket veto of a bill is possible only when two conditions obtain: (1) when Congress has adjourned, and (2) when return of the bill is prevented. Under *Wright v. United States*, 302 U.S. 583 (1937), an "adjournment" for purposes of the pocket veto occurs only when both Houses of Congress have recessed. In this case, only the House was in recess, and its members were subject to immediate reassembly. Furthermore, a return of the bill to the House of origin was not prevented because a duly designated agent of the House was available to receive the return throughout the 10-day period allowed for the President's consideration of the bill, a practice explicitly permitted under *Wright*.

The "qualified veto" procedure set forth in the Presentment Clause was chosen at the Constitutional Convention during which the framers considered, and expressly rejected, the concept of an absolute veto. The pocket veto is an absolute veto. A qualified veto is subject to override by the Congress and is Constitutionally favored over the pocket veto.

Construction of the Presentment Clause must be guided by practical considerations, so as to ensure preservation of its two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to override them. Brief intersession and intra-session adjournments of Congress, especially in light of modern communications

and travel capabilities, do not operate to prevent a return of a bill by the President, nor its reasonably prompt reconsideration by the Congress.

2. The finely wrought procedures of the Presentment Clause allow for only two types of vetoes: qualified vetoes (returned to Congress for possible override) and pocket vetoes (not returned). In this case, the President issued a Memorandum of Disapproval of the National Defense Authorization Act of 2008, wherein he purported to invoke simultaneously both the pocket veto power and the qualified veto power—a so-called "hybrid veto." Since the founding of our country, presidents have sent written explanations to Congress explaining their reasons behind the exercise of the pocket veto, and constitutional scholars have uniformly agreed that those explanations are constitutionally insignificant and do not constitute a return of a bill. If the President withholds his signature in a situation where return of the bill was not prevented under the *Wright* analysis, then the bill becomes a law on the 10th day, even if the President has explained his reasons for the ostensible pocket veto.

The statutory enactment procedures of the Presentment Clause require the President to either return a bill or withhold his signature. This obligation is the President's alone and cannot be delegated to Congress. The notion of a "hybrid veto" is inherently contradictory and ambiguous, and operates to obfuscate the President's decision, thereby impeding the Congress' constitutional mandate to reconsider vetoed bills. Additionally, the "hybrid veto" imbues the entire legislative process with uncertainty, encourages litigation, and causes delay in an area where efficiency and precision are of utmost importance.

## ARGUMENT

### THE ORIGINAL NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008 BECAME A LAW ON DECEMBER 30, 2007 BECAUSE THE PRESIDENT DID NOT VETO THE ACT IN ACCORDANCE WITH THE CONSTITUTION.

### I. The President Did Not Effectuate a Pocket Veto of the Original NDAA Because He Was Not Prevented From Returning It to Congress.

The authority for the President's veto power is found in the Presentment Clause of the Constitution. After a bill has passed both Houses of Congress, but "before it become[s] a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. Const. art. I, § 7, cl. 2.[11] The President's "return"

[11] The full text of the relevant paragraph of Section 7 provides:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

of a bill, which is usually described as a "veto," is subject to being overridden by a two-thirds vote in each House, which is why it is sometimes known as a "qualified veto."

The Presentment Clause allows for an absolute veto in only one situation, *i.e.*, when "the Congress by their Adjournment prevent its return" within 10 days, "in which case it [the bill] shall not be a law." The fundamental purpose of what is known as the "pocket veto" provision is to guard against the possibility that Congress could pass a bill but then quickly adjourn as a way of avoiding a veto before the President had a chance to return the bill.[12] In other words, the pocket veto is possible only when two conditions obtain: (1) when Congress has adjourned, and (2) when return is prevented.

Accordingly, the crucial inquiry in this case is whether the House of Representatives' Christmas holiday adjournment was an adjournment of the Congress which prevented the return of the bill, notwithstanding the official and well-known designation of the Clerk of the House to receive veto messages during a brief recess, the readiness of members of Congress to reassemble if summoned by the Speaker, and the fact that the Senate remained in *pro forma* session. The correct answer is that there was no such adjournment; therefore, the attempted pocket veto was invalid.

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[12] Robert J. Spitzer, *The Law: The "Protective Return" Pocket Veto: Presidential Aggrandizement of Constitutional Power*, Presidential Studies Quarterly, 722 (Dec. 2001) (hereinafter "Spitzer, *The 'Protective Return' Pocket Veto").*

### A. The President was not prevented from returning the Original NDAA because the Senate remained in session, he had adequate opportunity to review the bill, an agent of the House was available to receive veto messages, and Congress was available to act with "reasonable promptitude" on the President's objections.

Pocket vetoes reflect the practice of the 19th and early 20th centuries, when Congress would adjourn for significant periods of time between the first and second sessions.[13] After ratification of the Twentieth Amendment on January 23, 1933, short Congressional sessions disappeared, as did lengthy inter-session adjournments. Congress now meets year-round.

The question of when an adjournment of a House of Congress prevents the return of a bill under article 1 section 7, clause 2 has been before the Court on two occasions: *Okanogan Indian Tribe v. United States*, 279 U.S. 655 (1929) (*The Pocket Veto Case)* and *Wright v. United States*, 302 U.S. 583 (1938).

*The Pocket Veto Case*, involved a lengthy intersession adjournment of Congress. The bill at issue in that case reached President Coolidge less than 10 days before the close of the first session of the 69th Congress. The

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[13] James Madison was the first president to exercise a pocket veto. Both of President Madison's pocket vetoes were done after lengthy adjournment between the first and second sessions of Congress. *See* discussion in Louis Fisher, *The Pocket Veto: Its Current Status*, Congressional Research Service (March 30, 2001) (citations omitted).

intersession adjournment lasted from July 3 until December 6, 1926—over five months. The Court unanimously ruled that the adjournment of Congress at the end of a session prevented the return of the bill by the President to the Congress, because the House from which the bill originated was not sitting in an organized capacity, and the Constitution did not allow for delivery of the President's objections to an officer or agent of either House during the adjournment. *Id* at 684.[14]

Nine years later, this Court ruled in *Wright v. United States* that a 3-day intra-session recess of one house of Congress did not constitute an adjournment which prevented the return of a bill to that legislative body by the President within the meaning of article I, section 7, clause 2. The Court identified the threshold question as whether the Congress had adjourned, and then stated:

> 'The Congress' did not adjourn. The Senate alone was in recess. The Constitution creates and defines 'the Congress.' It consists 'of a Senate and House of Representatives.' Art. 1, section 1. The Senate is not 'the Congress.' . . . . The reference to the Congress is manifestly to the entire legislative body consisting of both Houses. Nowhere in the

[14] In reaching its conclusion, the Court pointed out that the formal rules of the Senate did not allow for appointment of agents for purposes of receipt of presidential communications. *Id.* Accordingly, the Court was not striking down a formally established congressional practice.

> Constitution are the words 'the Congress' used to describe a single House.

*Wright v. United States*, 302 U.S. 587–588 (1938). Furthermore, and notwithstanding the fact that the Senate—the chamber in which the bill originated—was in recess, the Court determined that there was no "practical difficulty" in making a return of the bill because the organization of the Senate continued, "an accredited agent of the legislative body" (*i.e.*, the Secretary of the Senate) was available to receive the bill, and the Senate would be able to act with "reasonable promptitude" upon the President's objections. *Id.* at 590.

The *Wright* Court also limited the opinion and dictum of *The Pocket Veto Case*, explaining that the dangers that the Court had envisaged in that case—*i.e.*, keeping of the bill in an indefinite state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered—"appear to be illusory when there is a mere temporary recess" after which the Congress would be able to act with "reasonable promptitude" upon the President's objections. *Id.* at 590, 594.[15] The Court explicitly contradicted the idea in *The Pocket Veto Case* that Congress could not designate agents to receive vetoed bills or for other purposes, and cautioned that the earlier case should not be construed so broadly so as to "frustrate the fundamental purposes of the constitutional provision as to action upon bills." *Id.*

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[15] However, there is no specific time period within which Congress must act upon those objections. If Congress chooses to do nothing, the President's veto prevails.

The Court emphasized that construction of the Presentment Clause must be guided by practical considerations, so as to ensure preservation of its two fundamental purposes: (1) that the President shall have suitable opportunity to consider the bills presented to him, *and* (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to override them. *Wright v. United States*, 302 U.S. at 596 (citation omitted). To that end:

> [t]here is no greater difficult[y] in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. . . . To say that the President cannot return a bill when the House in which it originated is in recess during the session of Congress, and thus afford an opportunity for the passing of the bill over the President's objections, is to ignore the plainest practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right.[16]

302 U.S. at 590.

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[16] The *Wright* Court's new emphasis on practical considerations referred explicitly to the reasoning in the *amicus* brief of Congressman Hatton Sumners, who had unsuccessfully made the same argument on behalf of the Petitioners in *The Pocket Veto Case*. *Wright v. United States*, 302 U.S. at 593; *see* Brief of Hatton W. Sumners, Representative of the Committee on the Judiciary of the House of Representatives as *Amicus Curiae* Supporting Petitioners, in *The Pocket Veto Case* (hereinafter "Sumners Brief").

Lower courts applying the "practical considerations" standard of *Wright* to the modern Houses of Congress have consistently determined that brief intra-session and intersession adjournments do not operate to prevent a return of a bill by the President. One such case was *Kennedy v. Sampson*, 511 F.2d 430, 437 (D.C. Cir. 1974) which stemmed from a Memorandum of Disapproval issued on December 24, 1970, by President Richard Nixon in which he claimed to exercise a pocket veto over the Family Practice of Medicine Bill during an intra-session adjournment of Congress. The bill had passed both houses of Congress with overwhelming majorities, providing what appeared to be ample votes to override any veto that the President might exercise. Both chambers of Congress adjourned on December 22 for the Christmas holidays.[17] The Senate, in which the bill originated, returned on December 28 and the House on the next day, several days after the final day for the President to act. A district court held that whereas the Christmas adjournment was short and temporary, and the Senate Secretary was designated to receive any messages from the President during that time, the adjournment had not prevented President Nixon from returning the bill to the Senate, and "therefore that the pocket veto was invalid and S. 3418 became a law without the signature of the President. . . ."[18] The decision was

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[17] By contrast, in the case now before the Court, the Senate was in *pro forma* session when the President claimed to have issued a pocket veto.

[18] *Kennedy v. Sampson*, 364 F. Supp. 1075, 1086–87 (D.D.C. 1973).

upheld by the D.C. Court of Appeals, and the Justice Department did not appeal to the Supreme Court. *Kennedy v. Sampson*, 511 F.2d 430, 432 (D.C. Cir. 1974).[19]

Similarly, in 1985, the D.C Court of Appeals in *Barnes v. Kline* struck down the pocket veto when used during a brief, intersession adjournment where the Houses of Congress had made arrangements for the receipt of veto messages. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated and remanded to dismiss sub nom. Burke v. Barnes*, 479 U.S. 361 (1987).[20]

Year-round sessions of Congress, improved means of transportation and instant communication, and the well-accepted use of legally designated agents all lead to the conclusion that the only adjournment which will prevent a return of a bill is the final adjournment of Congress itself, and not an adjournment of one of its sessions. In point of fact, Presidents Ford, Carter, and Reagan returned many bills during intersession and intra-session adjournments of more than 3 days duration—all in the period before the availability of

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[19] Senator Kennedy also challenged President Nixon's pocket veto of an urban mass transit bill, rendered between the first and second sessions of the 93rd Congress on December 22, 1973. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). But on April 13, 1976, the Ford administration consented to the entry of judgment in favor of Kennedy.

[20] The Reagan administration appealed, and in January 1987 this Court reversed the court of appeals and dismissed the suit as moot because since the law in question applied only to 1984, even had it been signed it would have by then expired.

cellular phones, instant messaging, and *Skype*.[21] In this case, the bill reached President Bush two weeks before the close of the First Session of Congress, and the Senate—and therefore, 'the Congress'—remained in session. That the President had "suitable opportunity to consider" the bill was apparent from the fact that he issued the Memorandum of Disapproval two days prior to the expiration of the 10-day period allowed by the Presentment Clause. *Wright v. United States*, 302 U.S. at 596.[22] The Clerk of the House was able to receive (and did receive) the President's objections, and the brief and temporary recess of the House—subject as it was to immediate reassembly—would have allowed Congress to act with "reasonable promptitude" on those objections. *Id.* at 590.

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[21] *See generally The Law Surrounding the President's Use of the Pocket Veto Hearing on H.R. 849 Before the Subcomm. On the Legislative Process of the House Committee on Rules*, 101st Cong. 1-54 (1989) (hereinafter "*Hearing on H.R. 849*"). Even if the Congress, due to a cataclysmic event, was temporarily unable to meet year-round, liberal use of the pocket veto would not be appropriate, as long as a duly designated congressional agent remains available to receive messages from the President and transmit them to congressional leaders. Under *Wright*, the inquiry remains a practical one.

[22] Certainly the use of [a Memorandum of Disapproval] is inconsistent with the theory that the President has not been afforded an opportunity to consider the bill. If the memorandum is transmitted to Congress during the same session . . . , there is no logical reason why the bill should not be eligible for reconsideration in the light of the President's reasons for withholding his approval.

Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 238 (1951).

### B. Extension of the "pocket veto" exception to circumstances where the fundamental purposes of the Presentment Clause have been met would result in an aggrandizement of presidential power that is contrary to the language of the Constitution and the Framers' abhorrence of an absolute veto.

As discussed *supra*, the sole purpose of the "pocket veto" provisions of the Presentment Clause was to prevent a situation where the Congress presents the President with an objectionable bill less than 10 days before the expiration of the session, thereby obviating return of the bill. Absent the "pocket veto," if a bill the President does not wish to sign cannot be returned to Congress, it becomes a law after ten days. Thus, the language of the Presentment Clause clearly indicates that the pocket veto power was created as an exception to the general rule that Congress must have the opportunity to override presidential disapproval of proposed legislation.[23] Whereas rejection of an absolute presidential veto is explicit in both the proceedings of the Constitutional Convention and in contemporaneous commentary,[24] the pocket veto may

[23] Congressional reconsideration of vetoed bills is a constitutional mandate. *See* discussion in Part II.B.(1), *infra*.

[24] *Sampson*, 511 F.2d at 437 (citing 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 104, 106 (ed. 1937)) (hereinafter cited as M. Farrand); 2 M. Farrand at 71, 200, 301, 582, 585 (the last page recording the opinion of one delegate that even a provision requiring a three-fourths vote to override "puts too much in the power of the President."). *See* J. Richard Broughton, *Rethinking the Presidential Veto*, 42 Harv. J. on Legis. 91, 103 (2005) (citations omitted).

fairly be described more as a limitation on presidential power.[25]

In this case there was adequate opportunity to carry out the constitutionally required statutory enactment procedures that clearly would have allowed Congress to fulfill its constitutional mandate to reconsider the bill and whether (or not) to attempt an override. The President was fully capable of delivering a veto message, and the House was fully capable of receiving one.

However, rather than seeking to comply with the language of the Presentment Clause and the intent of the Founding Fathers, the President has challenged the return obligation at the precise point at which, if followed one step further, it would rid him of jurisdiction over the bill and place it in the custody of the House of its origin so that the legislative plan fixed by the Constitution could be fully consummated.[26]

The "qualified veto" procedure was chosen at the Constitutional Convention during which the Framers considered, and expressly rejected, the concept of an absolute veto.[27] The seduction of the pocket veto is that

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[25] Broughton, *supra*, at 103 ("[T]he Convention's provision for a well-defined separation of powers, [and] its disdain for the accessories of kingly authority . . . suggested that the constitutional structure of the new government would be best served by a prudent and cautious view of the presidential veto.").

[26] Sumners Brief, *supra* note 16, at 28.

[27] *See* 2 M. Farrand, *supra* note 24, at 299–301. Alexander Hamilton wrote in the *Federalist*: "The king of Great Britain, (Cont'd)

it avoids an override fight and therefore guarantees short-term success for the President as well as making his lot a little less complicated, but the structure of the Constitution, and particularly the legislative process, does not hold ease and efficiency as its principal values. *INS v. Chadha*, 462 U.S. 919, 944 (1983).[28] A broad interpretation of which types of adjournments will operate to prevent the return of a bill would provide the President with precisely the expansive absolute veto powers which the framers rejected in Philadelphia. "Where choice may be had between two constructions, that construction is to be adopted which is most in harmony with the whole instrument of which the provision under construction is a part."[29]

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(Cont'd)

on his part, has an absolute negative upon the acts of the two houses of Parliament. . . . The qualified negative of the President differs widely from this absolute negative of the British sovereign. . . .". *The Federalist*, No. 69 at 464 (Alexander Hamilton). The abuse of the veto power by the king had seriously disturbed the colonists, who complained: "'He has refused his Assent to Laws, the most wholesome and necessary for the public good.'" Zinn, 12 F.R.D. at 212 (quoting *Declaration of Independence*).

[28] *See also Hearing on H.R. 849*, 101st Cong. 7 (statement of Robert J. Spitzer, Chairman, Chairman, Dept. of Political Science, State University College, Cortland, NY).

[29] Sumners Brief, *supra* note 16, at 79.

## II. A Memorandum of Disapproval Which Is Delivered to the Congress Under Claim of Both a Pocket Veto and a Qualified Veto Is Not a Veto of a Bill Within the Meaning of the Presentment Clause of the Constitution.

### A. A presidential veto must comply with the finely wrought procedures of the Presentment Clause.

The statutory enactment procedures of the Presentment Clause allows for two types of vetoes: regular vetoes (returned to Congress for an override vote) and pocket vetoes (not returned). The statutory enactment procedures of the Presentment Clause:

> were the product of the great debates and compromises that produced the Constitution itself. Familiar historical materials provide abundant support for the conclusion that *the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure*.'

*Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (quoting *INS v. Chadha*, 462 U.S. at 951).

#### (1) The Presentment Clause does not provide for a "hybrid veto" procedure.

The President in this case attempted to use a "hybrid veto"—a situation where the President claims the absolute power of pocket veto but, at the same time, indicates in the Memorandum of Disapproval that the bill is being returned, thereby subjecting it to a possible

override.[30] Not only is the "hybrid veto" not a product of the finely wrought procedures of the Presentment Clause but, by constitutional design and definition, the regular veto and the pocket are mutually exclusive and different acts.[31]

Beginning with the administration of George Washington, our nation's Presidents have understood the text of the Presentment Clause as requiring that he either "approve all the parts of a Bill, or reject it in toto."[32] Indeed, the recent and dubious validity of the President's attempt to claim simultaneously the power of the qualified veto and the absolute veto is apparent from the congressional testimony of William Rehnquist, then head of the Office of Legal Counsel in the Nixon administration, who stated:

> [i]t is a question of constitutional meaning, whether in a particular situation Congress has prevented the return of the bill by its adjournment. Now the President may be wrong in doing what he does; *but I do not think that, as I read the Constitution, it contemplates giving him an option* saying you either pocket veto in a situation or you can send it back with a veto message. . . . *[T]he President, based on*

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[30] Louis Fisher, *The Pocket Veto: Its Current Status*, Congressional Research Service, CRS-6 (March 30, 2001). The procedure has also been described as a "dual veto" and a "protective return" veto. *Ibid.*; Spitzer, *The "Protective Return" Pocket Veto*, at 728.

[31] Spitzer, *The "Protective Return" Pocket Veto*, at 729.

[32] *Clinton*, 524 U.S. at 440 (quoting 33 *Writings of George Washington* 96 (J. Fitzpatrick ed., 1940)).

> *whatever advice he can get, has to determine, 'Is this a pocket veto situation or is it a regular veto situation?' and it is either one or the other. . . .*[33]

**(2) A "hybrid veto" is not a "return" of a bill.**

Although the Constitution does not define what shall constitute a "return" of a bill, the Framers clearly understood that plainly stated term—and the means by which it would be effectuated—to be associated exclusively with the qualified veto.[34] When the President returns a bill within the meaning of the Presentment Clause, the established practice is to send a message to the appropriate House that begins with the words, "*I am returning herewith without my approval . . .*"[35] "Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *The Pocket Veto Case*, 279 U.S. at 689.

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[33] *Constitutionality of the President's "Pocket Veto" Power: Hearing Before the S. Subcommittee on Separation of Powers of the Committee on the Judiciary* (daily ed. Jan. 26, 1971) (statement of William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel) (emphasis added) (hereinafter, *Hearing: S. Committee on the Judiciary*); *Constitutionality of the President's "Pocket Veto" Power* (pp. 14–15); *see also* note 26, *infra*.

[34] *See The Federalist No. 73* (Alexander Hamilton) ("The first thing that offers itself to our observation, is the qualified negative of the President upon the acts or resolutions of the two houses of the Legislature; *or in other words, his power of returning all bills with objections. . . .*") (emphasis added).

[35] *See supra* note 5. This differs from the opening sentence of the Memorandum of Disapproval, which begins with the words, "I am *withholding* my approval. . . ."*Id.*

The use of the Memorandum of Disapproval as a device to effectuate both a pocket veto and "return" of a bill is a recent executive maneuver that is inconsistent with long-established legislative practice and not a proper return. The practice of issuing explanatory messages dates to the earliest pocket vetoes but faded after the Civil War. President Franklin D. Roosevelt revived the practice and made it an official policy of his administration to attach a formal memorandum of disapproval to a bill which was being "pocket vetoed."[36]

In the decades which followed, the practice—and its universally acknowledged constitutional insignificance[37]—continued. As William Rehnquist stated to the House Judiciary Committee:

> [W]here Congress by their adjournment has prevented the return of the bill, then [the President's] failure to sign it means it is not a

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[36] *See generally* Clement E. Vose, *The Memorandum Pocket Veto*, The Journal of Politics, Vol. 26, No. 2 (May 1964), pp. 397-405; Samuel B. Hoff, *The Presidential Pocket Veto: Its Use and Legality*, Journal of Policy History, Vol. 6, No. 2 (1994), p. 194 (citing Louis Fisher, *Constitutional Conflicts Between Congress and the President*, 2007, 5th edition); and Spitzer, *The Presidential Veto.*

[37] *See*, *e.g.*, Claudius O. Johnson, *American National Government* 512 (5th ed. 1960). ("Presidents have commonly stated their objections to bills they have pocket-vetoed, *but such statements are not official veto messages nor do they detract from the fact that the pocket veto is an absolute one, that may not be overridden by Congress.*"); *Hearing*, *S. Committee on the Judiciary*, *supra* note 24 (statement of William Rehnquist).

> law; *whether he accompanies it with a message or not does not make any difference. If, in fact, if it is a regular veto situation, then if he has not sent it back with a veto message, it becomes a law.*[38]

Congress has resisted presidential attempts to vest the Memorandum of Disapproval with the dual character of a pocket veto explanation and a veto message,[39] and has mounted successful legal challenges to the practice.[40] However, even if Congress were to appear to tolerate—either by affirmation or by acquiescence—the so-called "protective return," the practice would remain constitutionally defective. *Clinton v. New York*, *supra* at 436–49.[41] The provisions of Article I are integral

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[38] (emphasis added). *Hearing*, *S. Committee on the Judiciary*, *supra* note 24 (statement of William Rehnquist).

[39] The Congress has dispatched letters to, *inter alia*, Presidents George H.W. Bush, William J. Clinton, and George W. Bush objecting to use of the hybrid veto. *See.*, *e.g.*, 146 Cong. Rec. H11853 (Nov. 13, 2000) and 154 Cong. Rec. E2197 (Apr. 14, 2008).

[40] *Kennedy v. Sampson*, 511 F.2d 430; *Barnes v. Kline*, 759 F. 2d 21.

[41] A claim of power is frequently permitted or yielded to merely because it is claimed, and it may be exercised for a long period in absence of any constitutional right or power, or even in violation of constitutional prohibition without special occasion arising for its interpretation by a court, or anyone being sufficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the Constitution, or the neglect

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requirements of the constitutional design for the separation of powers, not abstract generalizations in the minds of the Framers of Constitution that may be altered at will by the President. *INS v. Chadha*, 462 U.S. at 945–946. That the "hybrid veto" should now be accepted as a legitimate effectuation of the Presentment Clause's mandate of "return" would be tantamount to allowing the President to achieve, by imposition of this new practice, that which must come only through the amendment procedures set forth in Article V of the Constitution. *Clinton*, 524 U.S. at 449.

### B. The uncertainty created by a hybrid veto impedes the constitutional mandate of congressional reconsideration of vetoed bills, and undermines the integrity of the legislative process.

#### (1) Congressional reconsideration of vetoed bills is a constitutional mandate that can be triggered only by the President's deliberate and non-delegable presidential exercise of the "qualified veto."

The Presentment Clause provides that upon receiving the President's veto message the House in which the bill originated:

> *shall* proceed to reconsider it. If after such Reconsideration two thirds of that House shall

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> to discharge constitutional duties or the disregard of the clear right of the Congress.

Sumners Brief, *supra* note 16, at 51 (quoting *Cooley's Constitutional Law* at 85).

> agree to pass the Bill, it *shall* be sent, together with the Objections, to the other House, by which it *shall* likewise be reconsidered, and if approved by two thirds of that House it *shall* become a law.

U.S. Const. art. 1, § 7.[42] As this Court stated in *Wright*,

> Where the President does not approve a bill, the plan of the Constitution is to give the Congress the opportunity to consider his objections and to pass the bill despite his disapproval. It is for this purpose that the time limit for return is fixed. *This opportunity is as important as that of the President.*

*Wright v. United States*, 302 U.S. at 596 (emphasis added). The constitutional requirement that Congress reconsider vetoed legislation reflects the Framers' belief that

> the oftener a measure is brought under consideration, the greater the diversity in the

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[42] It is not insignificant that the Framers chose the word "shall" in connection with the exercise of this congressional prerogative, for

> [i]n expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. . . . Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.

*Wright*, 302 U.S. at 588 (internal quotation marks and citations omitted).

> situations of those who are to examine it, the less must be the danger of those errors which flow from want of due consideration . . . .

*The Federalist No. 72* (Alexander Hamilton).[43]

The clear purpose of the Congress' obligation to reconsider a returned bill is to decide whether the bill will be put to a possible override vote. By definition, this obligation arises if—and only if—the President has vetoed the bill by returning it to Congress with his objections.

However, the inherently contradictory "hybrid veto" operates to obfuscate the President's actions, leaving in doubt the application of the "return" and "reconsideration" provisions of the Presentment Clause—"the certainty of whose application is of extreme importance." *Wright v. United States*, 302 U.S. at 599 (Stone, J., dissenting). Any construction of the Presentment Clause which might operate to frustrate

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[43] James Madison wrote of the importance of legislative reciprocity in his letter to Henry Clay, wherein he stated:

> [i]t is obvious that the Constitution meant to allow the President an adequate time to consider the Bills &c presented to him, and to make his objections to them; and on the other hand that Cong. should have time to consider and overrule the objections. *A disregard on either side of what it owes to the other, must be an abuse, for which it would be responsible under the forms of the Constitution.* . . .

9 G. Hunt, *Writings of James Madison* 515 (1910) (emphasis added).

Congress' opportunity to reconsider and override a vetoed bill is impermissible. *Id.* at 596 (citations omitted).

The fact that in this case Congress chose not to confront the President does not fix the constitutional problem.[44] The obligation to return or not a bill to Congress belongs to the President, and is not delegable to Congress. *INS v. Chadha*, 462 U.S. at 919. "Acquiescence or sufferance for no length of time can legalize a clear usurpation of power or a power exercised under a mistaken conception."[45]

In this case, therefore, the original NDAA, being neither signed by the President nor properly "returned" by him to the House of its origin, was neither vetoed by the President nor "reconsidered" by the Congress.

**(2) The "hybrid veto" imbues the legislative process with an uncertainty that encourages delay, public distrust, and litigation.**

The use of the hybrid veto introduces confusion into a field where definiteness and precision are of paramount importance. *Wright v. United States*, 302 U.S. at 604 (Stone, J., dissenting). In this very case, for example, Congress characterized the President's memorandum first as "double vetoes," then declared that the memorandum constituted a veto message, and

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[44] *See* 154 Cong. Rec. S57 (statement of Sen. Reid), *supra* note 8.

[45] Sumners Brief at 51.

ultimately behaved as if the measure had been pocket vetoed.[46] Instead of fulfilling presidential predictions that the dual veto procedure will "leave no doubt" that a bill was vetoed, the result is protracted uncertainty and disagreement with respect to the history and status of legislation[47] passed by Congress but disapproved by the President.

Such uncertainty places the delicate balance of legislative powers at risk. As an institution, Congress' responses to the duality of the "hybrid veto" have been inconsistent and ambiguous.[48] Absent judicial intervention, there is no way to say definitively whether

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[46] *See* 154 Cong. Rec. S54, S55-6, (daily ed. Jan. 22, 2008) (statement of Sen. Reid) and discussion at note 4, *supra*.

[47] For example, if the President exercises a "dual veto" and Congress does not attempt or does not succeed in an override, "either way the bill is dead, but the legal ambiguity of how it was killed remains." Spitzer, *supra*, at 730; 136 Cong. Rec. S349 (daily ed. Jan. 25, 1990) (statement of Sen. Kennedy) ("It is not clear now whether [the President] is relying on the pocket veto. And in questioning the counsel for the administration, they have some differences on that; they take issue about whether we are dealing with a pocket veto or a real veto. But if it should be a pocket veto, then it would not have to be respected. You would have a difference in the legal situation as well.").

[48] On some occasions members of Congress have treated the "protective return" as a pocket veto; on other occasions it has been treated as a veto message." *Compare* 136 Cong. Rec. S349 (daily ed. Jan. 25, 1990) (statement of Sen. Sarbanes) (Memorandum of Disapproval treated as a pocket veto) *with* Congressional Record – Senate, 136 Cong. Rec. S348 (daily ed. Jan. 25, 1990) (Memorandum of Disapproval is "mere correspondence.").

Congress' treatment of the President's exercise of a pocket veto in any given situation was proper. If characterization of the President's ostensible exercise of the pocket veto is left to congressional whim, then even the appropriate exercise of that power by the President is in peril.

Furthermore, the consequences of legislation produced in such an ambiguous manner include the inhibition of "public, certain, and prompt knowledge as to the status of the bill . . . ." *The Pocket Veto Case*, 279 U.S. at 685. The public cannot promptly and properly discern whether the "protective return" is an actual return that is subject to congressional override, or a fictitious return—*i.e.*, a pocket veto that is not subject to override—when its own government disagrees as to the bill's fate. *Id.*[49] These are precisely the dangers that the Presentment Clause is designed to avoid.

There are policy reasons to avoid hybrid vetoes as well. Public uncertainty encourages litigation to resolve the disagreement over the status of the legislation. For example, where the President exercises a hybrid veto, but Congress succeeds in override votes, potential litigants who are harmed either by the bill's enactment (successful override) or by its defeat (through pocket veto) may file suit. Additional litigation is likely if the President orders that the bill not be published as a law.[50]

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[49] 137 Cong. Rec., S1890, S1894 (daily ed. Feb. 19, 1991) ("The President's actions on H.R. 2712 and the Congress' response are but the latest in a string of thrusts and parries. The President believes he exercised a 'pocket veto' and the bill is dead. The House has treated H.R. 2712 and its papers as though the President exercised a traditional 'return veto'.").

[50] *Id.*

Requiring Congress to re-pass an ostensibly pocketed bill is not an appropriate solution to these constitutional problems. Such a routine is, at best, unnecessarily repetitive and time-consuming. As explained by one senior Senator, the passage of bills requires subcommittee and full committee action as well as proceedings on the floors of both the Senate and the House—expenditures of time and personnel that are funded by limited public coffers.[51] At worst, if the unique alchemy of public and private interests that enabled the legislative process to function successfully the previous time around had disappeared, the result may be that the bill cannot be passed again. It is, therefore,

> against all reason and every recognized rule of construction, when the avoidance of unnecessary delay is so clearly manifest in the provision sought to be construed, that a construction should be superimposed which would make for delay . . . .

*Wright v. United States*, 302 U.S. at 591 (internal quotation mark and citation omitted).

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[51] Edward M. Kennedy, *Congress, the President, and the Pocket Veto*, 63 Va. L. Rev. 355, 381 (1977).

## CONCLUSION

In litigation on the pocket veto, this Court has made clear that it operates to prevent Congress from gaining the upper hand in the legislative process by passing legislation and then adjourning prior to the expiration of the 10 days provided for the executive's consideration under the Constitution. *See* s*upra* Part I.B. Because the pocket veto operates as an absolute veto this Court has made equally clear that a pocket veto is to be strictly construed, and where the conditions precedent for a pocket veto do not exist then the attempt is a nullity and by operation of the Presentment Clause the legislation becomes law. *See supra* Part I.A. In the case of H.R. 1585, Congress was in session. Accordingly, the President's attempt at a pocket veto is a nullity, and by operation of the Presentment Clause, H.R. 1585 became law.

It is tempting to conclude that the President acted simply in an overabundance of caution and give effect to his intent to veto the legislation by pocket or otherwise. That conclusion, however, is belied by the fact that if the President was unsure of whether Congress was truly out of session he could have simply attempted to return the bill to Congress with his veto. If Congress was truly out of session then pursuant to the Presentment Clause his attempted but failed return would have acted as a pocket veto. If instead Congress was in session, then his return would have effectively vetoed the resolution, allowing Congress to either attempt to override or abandon the legislation as written.

Rather than vetoing the legislation and then returning it to Congress, what the President did was to attempt to stack the deck in his favor by alternatively citing his powers to pocket veto the bill and to veto the bill, thereby leaving Congress with the Hobson's Choice of either treating the bill as a veto that it could override, or as a pocket veto that it could not. As demonstrated by the reaction of individual Senators and Congressmen, the President's use of alternative authorities for his veto unquestionably gave Congress pause. *See supra* notes 7-9 and accompanying text. What is known is that the congressional leadership ultimately chose to treat the President's actions as a regular veto, but chose not to attempt an override. What is unknown is to what extent the uncertainty created by the President's actions influenced that choice. Congress had to be aware that in the event that they succeeded in overriding the President's veto the legislation would face an uncertain future in both the executive branch's willingness to expend the funds contained within the legislation and in the courts, should opponents of the legislation seek to challenge its viability. This uncertainty, coupled with the urgent need for the funding contained within the legislation ultimately dictated Congress' choices. Congress did not attempt an override, and instead passed a revised bill, absent the provision including the amenability of the Republic of Iraq to suit in federal courts, to which the President objected, and the President signed the legislation.

In short, by claiming both the pocket veto, and hedging this by claiming in the alternative that the memorandum operated as a veto, the President got what the President wanted. Giving effect to this hybrid form of veto, however, tips the balance of power towards the President, and as this court held in *Wright*, *Chadha*, and

*Clinton v. New York*, strict adherence to the Presentment Clause is necessary to preserve the balance created by the founders. If the President attempts to invoke the power of the pocket veto, in whole or in part, without the precedent requirements, as was the case with H.R. 1585, then the legislation must become law, as the former head of the Office of Legal Counsel, William Rehnquist, pointed out.

The power of the pocket veto is extraordinary, and to prevent it from having unintended consequences in tipping the balance, the risk must fall to the President to correctly determine whether the conditions precedent exist. If the President is permitted to hedge this determination, then the President can use the extraordinary power of the pocket veto without risk, and will undoubtedly continue to do so in situations where it is not appropriate, as was the case here.

For the foregoing reasons, this Court should affirm the *Simon* court's judgment.

Respectfully submitted,

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